

After reviewing the record and considering the arguments, the Appeals Board (Board) finds the Administrative Law Judge (ALJ) did not exceed her jurisdiction and the Board is therefore not authorized to review the ALJ's preliminary hearing Order at this stage of the proceedings. The Board finds, therefore, that this appeal from the ALJ's Order should be dismissed.

No testimony was offered at the Preliminary Hearing, only statements of counsel. In its brief to the Board, respondent makes the following factual assertions:

1. A preliminary hearing was scheduled for January 17, 2002 at 9:00 a.m.
2. On the morning of January 15, 2002, respondent attorney inquired of claimant attorney concerning what specific benefits claimant was seeking at the upcoming hearing.
3. Respondent attorney indicated at this time that he was confident that the respondent would voluntarily provide whatever benefits the claimant was seeking.
4. Claimant's attorney was unable to specify what specific benefits the claimant was requesting but did promise to call and notify respondent counsel of the benefits being sought.
5. Claimant attorney contacted respondent attorney at approximately 5:00 p.m. on January 16, 2002. At that time, claimant attorney indicated that the benefit being sought by claimant was change of physician.
6. Respondent attorney immediately called the respondent for authorization and shortly after 5:00 p.m. notified claimant attorney that, rather than litigating the issue of whether the treatment provided was satisfactory, the respondent was willing to voluntarily provide a list of three physician names pursuant to K.S.A. § 44-501h(b)(1). Respondent attorney also provided claimant attorney with a list of three physician names at this time.
7. Claimant's attorney did not recontact respondent's attorney on January 16, 2002, or prior to 9:00 a.m. on January 17, 2002. As a result, respondent's attorney was forced to appear at the workers compensation court on January 17, 2002.
8. After arriving at Workers Compensation Court but prior to the preliminary hearing, claimant's attorney notified respondent's attorney that this claimant had selected Dr. Estivo from the list of the physicians provided by respondent.

9. After claimant made the selection of Dr. Estivo, claimant demanded that the administrative law judge issue an order ordering the respondent to provide the claimant a list of three physician names and ordering the respondent to authorize Dr. Estivo, the physician claimant had already selected from the list of three names.
10. Respondent objected to the administrative law judge issuing an order which ordered the respondent to provide the benefits the respondent had already provided voluntarily.
11. A preliminary hearing was then conducted. At the hearing, claimant attorney announced that the reason he was requesting court intervention was "so that the respondent is not in a position in the future to unilaterally change from Dr. Estivo or any authorized doctor or his referrals." (January 17, 2002 Prel. Hrg., p.5, 11. 5-9).
12. Despite the fact that claimant's request for benefits had been voluntarily complied with by the respondent prior to any hearing being convened, the administrative law judge nevertheless issued an order ordering Dr. Estivo as the authorized treating physician.¹

In her brief, claimant disagrees with some of respondent's factual assertions and describes the chronology as follows:

1. Claimant counsel submitted a letter to Respondent by Certified Mail on December 4, 2001, requesting a change of treating physician.
2. Respondent did not respond to claimant counsel's request within seven (7) days.
3. Claimant counsel submitted a letter to the Director on December 12, 2001, requesting that the matter be docketed for hearing.

¹ Respondent's Brief, pp. 1-3 (filed Feb. 15, 2002).

4. The Director's office submitted a notice of hearing to claimant counsel, Administrative Law Judge, and respondent on December 18, 2001.
5. Respondent continued to refuse, neglect or ignore claimant's request.
6. Claimant counsel then sent notice, on January 2, 2002, of a preliminary hearing scheduled for January 17, 2002. Respondent was sent notice at that time.
7. Claimant counsel heard nothing from respondent or their counsel until approximately January 15, 2002.
8. Claimant counsel, while working on another case in Workers' Compensation Court, was approached by respondent counsel on January 15, 2002, at which time respondent counsel suggested that respondent wanted to give claimant counsel everything he wanted.
9. Claimant counsel then contacted respondent counsel on January 16, 2002, requesting that Dr. Paul Stein (neurosurgeon) be authorized to provide authorized care. Respondent counsel indicated that he had to contact respondent.
10. Respondent counsel then called claimant counsel's cell phone, offering a list of three (3) physicians.
11. Claimant counsel continued to request Dr. Stein, as the medical indicated that the injury was so severe as to warrant care by a neurosurgeon.
12. On the morning of January 17, 2002, respondent and claimant counsel met prior to the scheduled hearing.
13. Claimant counsel continued to insist on Dr. Stein as the authorized physician.

14. Shortly before the scheduled hearing, claimant counsel agreed to choose a physician from respondent's list of three (3), provided that, and only that, the list be by agreed order.
15. Respondent refused to enter into an agreed order.
16. The scheduled hearing ensued.
17. The Administrative Law Judge issued her Order of January 17, 2002.²

There is no specific mention of Dr. Stein in the transcript of the January 17, 2002 Preliminary Hearing before the ALJ. Although counsel for claimant first mentioned that he told respondent's counsel he wanted a neurosurgeon to provide claimant's treatment, he then announced to the Court that claimant had chosen Dr. Estivo [from the list of three] as the Court ordered change of physician.³

Claimant asked the ALJ for additional medical treatment, a change of treating physician and temporary total disability compensation if taken off work by the authorized treating physician. Judge Barnes granted each of claimant's requests. The ALJ's Order specifically named Dr. Estivo as the authorized treating physician.⁴ Respondent argues that in holding a preliminary hearing the ALJ exceeded her jurisdiction because there was no controversy. Respondent had already agreed to a change of treating physician and provided claimant with a list of three physicians from which claimant had selected Dr. Estivo.

As above indicated, the Board has concluded the respondent's appeal does not raise a jurisdictional issue subject to review. Respondent cites the decision by the Board in *Beck v. Beech Aircraft Co.*, WCAB Docket No. 216,221 (May 2001). In that decision, it was determined that an order changing authorized physician after the respondent had already provided a list of three physicians and agreed to authorize the specific physician claimant requested, left no justiciable controversy for the ALJ to decide. But *Beck* involved an application for post-award medical benefits pursuant to K.S.A. 44-510k and attorney fees under K.S.A. 44-536(g). This case comes before the Board on an appeal from a

² Claimant's Brief, pp. 1-3 (filed March 1, 2002).

³ Tr. of Prel. H. p. 5 (Jan. 17, 2002).

⁴ See *Briceno v. Wichita Inn West*, WCAB Docket No. 211,226 (Feb. 1997) and *Graham v. Rubbermaid Speciality Products* WCAB Docket No. 219,395 (June 1997).

preliminary hearing. Therefore, the Board's jurisdiction to review the Order is limited.⁵ Here claimant was seeking preliminary hearing benefits and a change of physician under K.S.A. 44-510h(b)(1). That statute provides in pertinent part as follows:

If the director finds, upon application of an injured employee, that the services of the health provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, **the director may authorize the appointment of some other health care provider.** In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider. (*Emphasis added.*)

This case is further distinguishable from *Beck* because here, unlike in *Beck*, respondent had delayed providing claimant treatment with an appropriate physician until the eleventh hour. The ALJ specifically noted in her Order that respondent had been given several opportunities to provide claimant with the name of an appropriate physician but failed to do so until the day before the hearing. Under these circumstances claimant was distrustful of respondent's intentions and wanted an order. Furthermore, claimant asked the ALJ for an order not only specifically providing for a change of physician, but also naming that physician and ordering temporary total disability compensation if claimant was taken off work by that physician. By proceeding to hearing, as opposed to agreeing to Dr. Estivo being authorized by respondent voluntarily, claimant obtained the protection afforded by an ALJ's Order. In addition, the matter of temporary total disability compensation was addressed in the Order. There is no mention by either party of this subject being discussed or agreed to before the preliminary hearing. Thus, there was a justiciable controversy and the ALJ had jurisdiction to decide the question.

WHEREFORE, the Appeals Board finds and concludes that the appeal by the respondent should be dismissed as the Administrative Law Judge did not exceed her jurisdiction and the Appeals Board is otherwise without jurisdiction to consider the issues of medical treatment and temporary total disability compensation on an appeal from a preliminary hearing order.

⁵ See K.S.A. 44-534a and K.S.A. 44-551.

IT IS SO ORDERED.

Dated this _____ day of May 2002.

BOARD MEMBER

c: Terry J. Torline, Attorney for Respondent
Steven R. Wilson, Attorney for Claimant
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director